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ENVIRON... F.P.A. ...AL APPEALS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6

IN THE MATTER OF:

Mr. Harry Corbett
HABSCO, INC.
2410 North Highway 62
Orange, Texas

DOCKET NO. C8905

Initial Decision/Denial of Motion for Default

This is a proceeding under Section 1414(g) of the Safe Drinking Water Act (the "Act"), 42 U.S.C. §300g-3(g), begun by a Complaint filed with the Regional Hearing Clerk on June 21, 1989, by the Complainant, The Director of the Water Management Division of Region 6 of the Environmental Protection Agency (hereinafter, the "EPA"), against the Respondent, HABSCO, INC. (hereinafter, "HABSCO" or "Respondent)." The Director had been delegated the authority to issue the Complaint.

The Act authorizes the issuance by the EPA of an administrative order against the owner or operator of a public water system (PWS) which is alleged to be in violation of the Act or the implementing regulations. Section 1414(g) of the Act. An order issued under this provision is called a "compliance order", requiring the Respondent (the "owner/operator") to take certain actions to correct the violations and bring the public water system into compliance with the Act and the regulations. The Act provides that, if the order is violated, the Administrator may bring an action to assess a civil penalty. If the penalty to be assessed does not exceed $5,000, the action may be by administrative Complaint. Section 1414 (g)(3)(B), 42 U.S.C. §300g-3(g)(3)(B). See also 40 C.F.R. §22.42(c).

Respondent has not filed an Answer in this case and, pursuant to 40 C.F.R. §22.16(c), the action is before the Regional Administrator on a Motion to Enter Default. Further, pursuant to 40 C.F.R. §22.04(b), the action has been delegated to the Regional Judicial Officer.

Pursuant to the Consolidated Rules of Practice promulgated at 40 C.F.R. §22 and the record filed with the Regional Hearing Clerk in this case, the Motion to Enter Default is DENIED for failure to establish a cause of action.

PRELIMINARY STATEMENT

This case has a long history. Complainant filed the Complaint and Notice of Opportunity for Hearing on June 21, 1989. The Complaint alleges, as it must, that Respondent HABSCO had violated an dministrative order, in this case Administrative Order F8841. The Complaint alleges that the Respondent received the Complaint on June 23, 1989. No further action was taken on the case until March 23, 1992, when Complainant filed a Motion for Default Order, based on the failure of the Respondent to file a timely Answer and seeking the full $5,000 penalty.

HABSCO responded to the Motion to Enter Default on April 10, 1992, stating that the system had been in "dire financial stress" for over two years, and further offering information on the attempts by the operator to comply. On November 6, 1992 and again on January 12, 1993, Complainant requested of the Respondent financial data to support its allegation that it could not pay the proposed penalty.

Respondent sought counsel at this point, and counsel (Mr. William L. Earle, Sr.), in a letter dated January 28, 1993, advised Complainant that he had advised Respondent not to send any information to the EPA (or the state). The advise was rendered upon concern by Mr. Earle that his client may be put in double jeopardy, stating that the State and the EPA were pursuing penalties for the same violations.

By letter of February 11, 1993, Complainant stated to Respondent's counsel that both the state and the EPA could pursue a case under their differing laws. In the same letter, Complainant again requested the financial information.

On April 26, 1993, Respondent was advised by letter of new counsel at EPA. The letter also reiterated the request for the financial data. Respondent received tha letter on April 29, 1993. The letter requested that the data be sent to the EPA by May 12, 1993. The EPA advised that, if the financial data were not received by that date, the EPA would seek a default in this case. There was no response from Respondent or his counsel on the latest request. Accordingly, Complainant filed a Motion to Enter Default on May 18, 1993, which Respondent received on May 21, 1993, as evidenced by the U.S. Postal return receipt. There has been no response by HABSCO to the May 18 Motion to Enter Default.

DISCUSSION

The enforcement of a violation of the Act by a public water system is by statute a more complicated procedure than most other statutes. Whether proceeding judicially or administratively, the

EPA must first issue an order requiring the system to comply with the Act or the regulation. 42 U.S.C. §300g-3(a) and (b). At the discretion of the Administrator, an action may be brought in the civil courts or administratively to enforce noncompliance with an order. id. and 42 U.S.C. §300g-3(g). In this case, the EPA has administratively pursued an alleged violation of an order by seeking a civil penalty of not more than $5,000.

The order sought to be enforced through imposition of a civil penalty is Administrative Order F8841. The order, a "compliance order" is by its nature prospective. The Act states that an order "shall" be issued "requiring the public water system to comply with the regulation...." (emphasis mine). See 42 U.S.C. §300g-3(a). Similarly, Subsection (g)(1) of the section authorizes an order "to require compliance with such regulation." The guidance for the issuance of PWS Administrative Orders[1] provides:

> Section 1414(g)(1) and (2) orders are compliance orders only... The Act does not explicitely state the Administrator may specify a reasonable time for compliance with the terms of a PWS administrative order. Nevertheless, based on an analysis of Part B of the Act, EPA's ...prescribing such a time, where appropriate, is consistent with and authorized by the Act.

This language, suggesting a compliance schedule, re-enforces the

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[1] The Complaint was issued in June of 1989. The regulations implementing the 1986 Amendments to the Safe Drinking Water Act were not published until January 30, 1991. See Federal Register, Wednesday January 30, 1991, page 3752 et seq. The previous guidance, issued on January 20, 1987, controls these proceedings. See the explanation in the Fed. Reg., cited infra, page 3752.

fact that the §1414(g) orders are prospective. Such an order must find a violation and then order the PWS to comply.

Administrative Order F8841, on which the Complaint is based, makes a finding that HABSCO:

> ...violated 40 C.F.R. §141.21 by failing to submit samples to an approved laboratory for coliform analysis from March 1986 through March 1988.

F8841, FINDINGS, Paragraph 4. The order further instructs Respondent to "comply upon receipt of this Order with the requirement of 40 C.F.R. §141.21 to analyze or use the services of an approved laboratory for coliform bacteria at least once per month."

The Complaint alleged violations of F8841 from November 1988 through March 1989. The Complaint also alleges that Administrative Order F8841 was issued on October 14, 1988, after opportunity for public hearing, which would have two ramifications:

1. That a proposed administrative order had been issued prior to the October 1988 date, and
2. That the Order issued October 14, 1988, as alleged, was a final order following public participation.

Assuming the allegations in the Complaint to be true, the June 21, 1989 Complaint would be correct in assessing penalties for violations in a prior order, i.e., from "November 1988 through March 1989."

But, the Complaint and the Administrative Order were issued <u>on the same day</u>, June 21, 1989. That being the fact, the violations as

alleged under the Complaint would taken place before the June 21, 1989 administrative order. The Respondent, under those circumstances, would not have had a chance to comply with the regulation as ordered. Administrative Order F8841 was by its terms effective "upon receipt by a representative of HABSCO, INC." And, Administrative Order F8841 was made a part of the Complaint "and incorporated by reference." Complaint, Para. 6.

There is thus a severe discrepancy between Administrative Order F8841 and the Complaint. The administrative record before me contains no explanation of the discrepancy and there is no other document in the record to overcome it[2].

I am aware that upon a default, the Respondent by failing to answer is generally deemed tha have admitted "all facts alleged in the Complaint." 40 C.F.R. §22.17. The issue here is whether inconsistent facts on the face of the Complaint first, state a cause of action and second, whether in the law such facts must be deemed admitted by the Respondent.

The Complainant has the burden of proof to sustain its case. See 40 C.F.R. §22.24. A Complaint must include "a concise statement of the factual basis for alleging the violation." 40 C.F.R. §22.14(a)(3). The mere inconsistency of alleging in the Complaint that F8841 was issued in October 1988, and the attached F8841 having a date of

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[2] The First Motion for Default alleged that Respondent received the administrative order October 19, 1988. Both the Complaint and Administrative Order F8841 were attached to this first Motion, and make up the administrative record to that date. The Administrative order attached to the Motion is the one dated June 21, 1989 and is the only one in the record.

June 1989 is flawed on its face and contains no factual basis to support a violation. Even a default judgement will be voided where the "pleadings disclose on their face a fact that would defeat the ...claim." Nishimatsu Const. Co., Ltd. v. Houston National Bank. 515 F.2d 1200, at 1206 (5th Cir. 1975). See also in accord McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226 (1st Cir. 1980) and U.S. v. V & E Engineering Co., Inc. 819 F. 2d 331 (1st Cir. 1987). The rule applies as well to relief requested in the Complaint. Matter of Dierschke, 975 F.2d 181 (5th Cir. 1992).Even though I am not here entering default, defendants (respondents) will not be held to admit facts that are not well pleaded. Nishimatsu, *supra*, at 1206. I conclude that the Complaint, both by its inconsistency and lack of supporting data, fails to state a cause of action.

FINDINGS OF FACT

I list here only facts not already found and stated in the narrative above.

1. Respondent owns and operates the HABSCO water system located in Orange County, Texas. The water system regularly provides piped water for human consumption through approximately 30 connections serving about 65 year-round residents. The water system is supplied from an underground source.

2. Respondent's water system is a "public water system" within the meaning of §1401(4) of the Safe Drinking Water Act (the "Act"), 42 U.S.C. §300(f)(4), his system is a "community water system" as defined by 40 C.F.R. §141.2.

3. Respondent is a "supplier of water" as that term is used in

§1401(5) of the Act, 42 U.S.C. §300(f)(5).

4. Respondent is a "person" within the meaning of §1401(12) of the Act, 42 U.S.C. §300f(12).

5. Respondent is subject to the requirements of Part B of the Act, 42 U.S.C. 300g through 300g-6, and the National Primary Drinking Water Regulations codified at 40 C.F.R. Part 141. In particular, Respondent is subject to the regulatory requirements of Part 141.21.

6. Respondent has not answered the Complaint filed on June 21, 1989.

7. Complainant has presented no physical evidence to support the allegation that an Administrative Order F8841 was issued to Respondent on October 14, 1988, or that Respondent ever received such an order.

8. Complainant has presented physical evidence of an Administrative Order F8841 issued to Respondent on June 21, 1989. Respondent has not presented physical evidence that Respondent received the June 21, 1989 order.

9. The Complaint in this case contains conflicting and inconsistent allegations relating to the alleged administrative order issued against the Respondent.

CONCLUSIONS OF LAW

1. I adopt as Conclusions of Law that Respondent owns and operates a public water system, which is a community system, and is a supplier of water, providing piped water to approximately 30 connections regularly serving about 65 residents, all as set forth

in the FINDINGS OF FACT, Paragraphs 1-3, *supra*.

2. I further adopt as Conclusions of Law that Respondent is a "person" as defined in §1401(12) of the Act, 42 U.S.C. §300f(12), and is subject to the requirements of the Act and 40 C.F.R. §141, and in particular §141.21.

3. Complainant has as a matter of law failed to establish a cause of action by the conflicting and inconsistent allegations therein.

4. I find no violation of the Act and the implementing regulations by the record before me, which consists of all the documents filed with the Regional Hearing Clerk to the date of this order.

EFFECT OF INITIAL DECISION

This order constitutes an initial decision of the Regional Judicial Officer pursuant to 40 C.F.R. §22.27(c) and shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, *sua sponte*, to review the initial decision.

ORDER

I therefore by this order direct that:

1. The Motion for Default Order dated March 23, 1992, and the Motion to Enter Default dated May 18, 1993, both be DENIED, and

2. Complainant may take any action is available to it under

the Consolidated Rules to cure its Complaint.

IT IS SO ORDERED. this 26th day of July 1993.

Mark E. Chandler

MARK E. CHANDLER
REGIONAL JUDICIAL OFFICER

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, the Regional Hearing Clerk for Region 6 of the Environmental Protection AGency, hereby certify that a true and correct copy of the Initial Decision and Denial of Motion for Default in the cause of Docket No. C8905, was served upon the parties or their counsel of record on the date and in the manner set forth below:

Mr. William L. Earle, Sr., Esq.
Ehrle & Associates
2215 E. Anderson Lane
P. O. Box 15343
Austin, Texas

U. S. FIRST CLASS MAIL - POSTAGE PREPAID - RETURN RECEIPT REQUESTED

Ms. Renea Ryland, Esq.
Assistant Regional Counsel
Environmental Protection Agency
1445 Ross Avenue, 13th Floor
Dallas, Texas

HAND-DELIVERED

Date: 7-26-93

Lorena S. Vaughn
Regional Hearing Clerk